Office-Supreme Court, U.S.
FILED
JAN 25 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 948

JAMES W. KINDELAN and MARY KINDELAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

THOMAS H. ANDERSON
10th Floor
First National Bank Building
Miami, Florida 33131
Attorneys for Petitioners

Of Counsel:
SHUTTS & BOWEN
10th Floor
First National Bank Building
Miami, Florida 33131

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

INDEX

Opinions Below 1
Jurisdiction 2
Question Presented 2
Statutes Involved 2
Statement 2
Reasons for Granting the Writ 4
Conclusion 15

Appendix—

Appendix A, Opinion of the United States Court of Appeals for the Fifth Circuit A1
Appendix B, Statutes Involved A2
Appendix C, Petition for Rehearing A3
Appendix D, Ruling No. 63-3, 26 C.F.R. 49.4241-1 .. A5

Table of Cases

Commissioner of Internal Revenue v. *Windrow*, 89 F.2d 69 10
Culver v. *Warren*, 84 Ohio App. 373, 83 N.E.2d 82 15
D.B.S. Building Association v. *City of Erie*, (177 Pa. Super. 487) 111 A.2d 367 12
Gould v. *Gould*, 245 U.S. 151 9
Hassett v. *Welch*, 303 U.S. 303 9
McFeely v. *Commissioner of Internal Revenue*, 296 U.S. 102 9
Miller v. *Standard Nut Margarine*, 284 U.S. 498 9
Niemotko v. *State of Maryland*, 340 U.S. 268 15
Scott v. *U. S.*, 300 F.2d 141 ..... 7, 15
Simkins v. *City of Greensboro*, (D.C.M.D.N.C. 1957) 149 F. Supp. 562 (Aff'd 246 F.2d 425) 15

State ex rel. v. *City of Miami Beach,* (Fla. D.C.A. 3d) (1961) 132 So.2d 349 15
U. S. v. *Graham,* 110 U.S. 219 10
U. S. v. *Hammers,* 221 U.S. 220 10
U. S. v. *Howe,* (C.C.A. 9 (1965) 349 F.2d 483 12
U. S. v. *Merriam,* 263 U.S. 179 9
White v. *Aronson,* 302 U.S. 16 9

TEXTS AND STATUTES

2 Am. Jur. (2) (Administrative Law) 68, Section 241 10
Chapter 26036, Laws of Florida, 1949 4
Chapter 27740, Laws of Florida, 1951 6
Florida Statute 167.73(2) 2, 14
International Dictionary of the English Language 12
Ruling No. 63-3, 26 C.F.R. 49.4241-1 11
26 U.S.C.A. 4231 2
26 U.S.C.A. 4233 ..... 2, 13
26 U.S.C.A. 4233(4) 2, 13
26 U.S.C.A. 4241 ..... 2, 3, 4, 7, 11
Webster's International Dictionary 12

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. .....

JAMES W. KINDELAN and MARY KINDELAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

The petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The Opinion of the District Court for the Southern District of Florida, is reported in 23[illegible] *F. Supp.* 537; the Opinion of the United States Court of Appeals for the Fifth Circuit affirming the judgment of the lower Court is dated October 18, 1965 (Appendix A), and is not officially reported. Rehearing was denied on November 4, 1965.

JURISDICTION

Jurisdiction is invoked under *28 U. S. Code* 2101(c).

QUESTION PRESENTED

Does a municipally owned, operated, managed and controlled non-profit golf course, tennis courts, swimming pool and club house operated for the benefit of all of the residents of the municipality constitute a social, athletic or sporting club within the meaning of *U.S.C.A. 4241,* so as to render the fees paid by the municipal residents for the use of the facilities subject to the excise taxes imposed by said statute?

STATUTES INVOLVED

The following statutory provisions are set forth in Appendix B:

26 U.S.C.A. 4231, 4233, 4233(4), 4241.
Florida Statutes: 167.73(2).

STATEMENT

Petitioners filed in the District Court of the Southern District of Florida complaint against the United States asserting that the respondent had erroneously and illegally assessed against the petitioners excise taxes for the years 1959 to 1961 inclusive, for the use of certain facilities belonging to Miami Shores Village. The complaint alleged that the petitioners had paid the alleged taxes, and, within the time required by law, had filed a claim for their

refund, which had been rejected. A copy of the claim was attached as an exhibit.

The complaint further alleged that the facilities for use of which the excise tax had been laid were municipally owned, and not subject to county or Village real and personal property taxes; that all of the residents of the Village were entitled to the use of many of the facilities without payment of any fee whatever; that for the use of other facilities, such as the swimming pool, tennis courts and golf links, use of which necessarily involve extra expenses for upkeep, maintenance and the employment of supervisory personnel, a fee was imposed; and that such a fee did not constitute dues paid to a social, athletic or sporting club within the meaning of *26 U.S.C.* 4241. Liability for the tax was denied and appropriate relief was sought (R. 175).

The respondent filed its answer in which it denied that the sums exacted had been illegally collected (R. 197).

The case was tried without a jury. In due course the trial court rendered its opinion (R. 213), in which it found that the municipally owned and operated country club was a sporting, athletic or social club or organization within the meaning of *Section 4241,* and that the monies paid for use of the facilities were properly subject to the tax under the statute. Pursuant to that opinion-order, a final judgment was entered dismissing the complaint (R. 226).

Petitioners took an appeal to the United States Court of Appeals for the Fifth Circuit, and that Court, on October 18, 1965, ... F.2d ....., rendered its opinion as follows:

"PER CURIAM: The district court made findings of fact and conclusions of law which are the basis for its judgment from which this appeal was taken. *Kindelan* v. *United States*, S.D. Fla. 1964, 233 F.Supp. 537. We find ourselves in agreement with the conclusions reached by the district court. See *United States* v. *Howe*, 9th Cir. 1965, . . . F.2d . . . The judgment of the district court is

AFFIRMED."

Petitioners timely filed a petition for rehearing which was denied without opinion on November 4, 1965, (Apendix C).

REASONS FOR GRANTING THE WRIT

The amounts paid by the residents of the Village to the Village for the use of the swimming pool, tennis courts and golf course were not dues paid to a social, athletic or sporting club or organization as those terms are used in Section 4241, *U.S.C.A.* for the following reasons:

I.

The Village golf course is a municipally owned facility operated under a Village ordinance by the Recreation Department of Miami Shores Village, a municipal corporation organized and existing under Chapter 26036, Laws of Florida, 1949. Evidence of this conclusion is furnished by the following undisputed facts:

(a) The responsibility for the actual operation of the facility was delegated by the Council to the Village Manager, the day to day operations being conducted by a club manager employed by the Village. The latter in turn has his own staff all of whom are employed by the Village.

(b) The golf course was established by the Village in 1937 on approximately 121 acres of land. The property was acquired by tax foreclosures, gifts and purchase. The club house and 18 hole golf course was constructed and financed by WPA grants and the proceeds of mortgages placed on the land.

(c) In 1945 the Village refinanced the whole project by the issuance of general obligation bonds, some of which are still outstanding. Proceeds from the operation of the facility were pledged to the payment of principal and interest on the bonds, and if this was insufficient ad valorem taxes were to be assessed to make up any deficiency. Since 1945 other improvements have been made to the physical facilities.

(d) The physical plant consists of a swimming pool, with locker and shower facilities; two parking lots of approximately 200 automobile capacity; a club house containing a lobby, administrative offices, dining room, main floor, bar, patio room, men's and women's locker rooms, and a men's bar on the lower floor; and 18 hole golf course, a golf shop containing merchandise for sale which is operated by a golf pro separate from the main club house, an office and a golf club storage space; and six tennis courts operated by a tennis pro with a small adjacent office.

(e) The Village Council determines the operational procedures of the club and is responsible for its appropriations, which is a part of the Village budget. The monies derived from the club operation are deposited in a Village bank account and disbursed according to budget authorization. A separate set of books and a separate bank account are used with respect to the operation of the club. Receipts from the club are brought forward into the

Village budget and disbursements are made only by checks signed by the Manager and Mayor, or other member of the Council.

(f) All of the permanent employees at the Club house, swimming pool and golf course are hired and discharged either by the club Manager, who is an appointee of the Village Manager, or by the latter, and all are paid with Village funds. They are subject to social security and Federal withholding taxes which are collected by the Village. They are members of the Village pension plan, a legislatively authorized measure, Chapter 27740, Laws of Florida, 1951, to which public funds may be contributed. No Florida unemployment tax is paid with respect to such employees.

(g) The club house is the only civic center in the Village. In it are held zoning and other hearings relating to the public affairs of the Village. The club house is used as one of the voting precincts for the holding of Village and State elections.

(h) Since 1946, when the Council passed Resolution No. 363, the use of the facilities has been restricted to citizens and residents of the Village.

(i) The facility is exempt from real and personal property taxes and no Federal income tax is paid on the profits derived from its operations.

(j) The Village facility has no constitution or by-laws. All rules for its operations were prepared by the Village Manager and approved by the Council.

(k) As a consequence of the rapid population growth in the area the facilities were not only restricted to citizens and residents, but in order to defray actual costs of operation and maintenance of the swimming pool and golf

course, and not to the view of making a profit, a fee is charged for the use thereof. This fee the resident users had the option of paying on a daily basis, or an annual basis, according to a specified schedule. The annual rate is a discounted amount for lump sum payment.

The above features are wholly foreign to a club concept and place this municipal operation beyond the reach of the tax collector.

Such, in effect, was the holding of the Court of Appeals for the 6th Circuit in *Scott* v. *U. S.*, 300 F.2d 141, which furnishes a basis for conflict certiorari.

In the cited case the District Court had ruled that similar municipal facilities were not a club within the meaning of Section 4241. The Court of Appeals reversed, emphasizing the existence of facts which brought the operation within the ambit of Section 4241. Every factor emphasized by the Court of Appeals in the *Scott* case for reversal is absent in the subjudice. While there is no direct conflict between the case at bar and the *Scott* case as to the ultimate result, the rationale for inclusion of the facility in the one commands the exclusion in the other. Thus it is obvious from a reading of the opinion in the *Scott* case that the Sixth Circuit would have affirmed the District Court there on the record in the case here. So, there is a direct conflict in spirit between the two decisions.

For example, in the *Scott* case the Court said:

> "The proof in that case shows that the city of Elizabethton does not pay the wages of employees of the golf club. It exercises no control over its operation. The city does not elect or appoint the board which operates the golf club. The city receives no money from the golf club and does not require an accounting

by it as to money received in its operation. The city did not employ complainant at the golf club and did not exercise any control over complainant's employment nor did the city in any manner undertake to supervise or control his duties. The proofs show that the complainant in the Chancery case, Lucas R. Russell, was employed by R. L. Starnes at the golf club and at no time was he on the payroll of the city. The proofs show that the golf club has its own bank account and payroll for employees working at the Club."

Now compare the District Court's decision in the case subjudice. In this opinion it is said:

"The Council determines the operational procedures of the Club and is responsible for its appropriations, they being part of the Village budget. The monies derived from the Club operation are deposited in a Village bank account and disbursed according to budget authorization. A separate set of books and a separate bank account are used with respect to the operation of the Club. Receipts from the Club are brought forward into the Village budget and disbursements are made only upon checks signed by the Manager or Mayor, or other member of the Council.

* * *

The club house is the only civic center in the Village. In it are held zoning and other hearings relating to the public affairs of the Village. The club house is used as one of the voting precincts for the holding of Village and State elections.

All of the permanent employees at the club house, swimming pool and golf course are hired and discharged either by the Club Manager, who is an appointee of the Village Manager, or by the latter, and all are paid with Village funds. They are subject to social security and Federal withholding taxes which are collected by the Village. They are members of the Village pension plan (a legislatively authorized meas-

ure, Chapter 27740, Laws of Florida, 1951, to which public funds may be contributed). No Florida unemployment tax is paid with respect to such employees.

The Club's lounge and restaurant facilities operate under the same legal provisions as those governing commercial enterprises. The Club is exempt from real and personal property taxes and no Federal income tax is paid on the profits derived from its operations.

No Florida sales tax is imposed or collected on articles purchased by the Village for Club use, such transactions being exempt under Fla. Stats. 1963, Ch. 212.08 (7)."

II.

The statute in question is obviously not intended to be applied to non-profit operations conducted by a municipality for the recreation and promotion of the health and well-being of its citizens. When an attempt is made so to apply the statute, the least that can be said for it is that it is ambiguous, and when acceptance is made of that fact it necessarily follows that the decisions of the lower Courts are erroneous, because all taxing statutes are to be construed most strongly against the government and in favor of the taxpayer, and any and all doubts are to be resolved against the taxing authority and in favor of the taxpayer. *Gould* v. *Gould,* 245 U.S. 151; *U. S.* v. *Merriam,* 263 U.S. 179; *Hassett* v. *Welch,* 303 U.S. 303; *White* v. *Aronson,* 302 U.S. 16; *McFeely* v. *Commissioner of Internal Revenue,* 296 U.S. 102; *Miller* v. *Standard Nut Margarine,* 284 U.S. 498.

The decision of the United States Court of Appeals is not only in conflict with the decision of this Court, and all other circuits announcing adherence to the aforegoing basic principle, but is in conflict with the Fifth Circuit's

own opinion in *Commissioner of Internal Revenue* v. *Windrow*, 89 F.2d 69.

The disregard of the foregoing basic principle of statutory construction constitutes a departure from the essential requirements of law and results in the taking of petitioners' property with due process of law.

III.

The Bureau of Internal Revenue in 1943 made an investigation of these very facilities and method of operation, and determined that the amounts paid by the residents to the Village for the use of the facilities did not constitute dues within the meaning of the statute (R. 192). That departmental ruling reads in part as follows (R. 193):

> "It appears that the members have no vote in the management of the affairs of the club and do not serve on committees, and that anyone may enjoy the facilities afforded upon payment of the daily or annual fee.
>
> It is held that the Miami Shores Golf Club does not qualify as a social, athletic or sporting club or organization, within the meaning of Section 1710 of the Internal Revenue Code, and that the dues and fees paid by the members are not subject to tax."

This long-standing administrative construction and interpretation placed upon the statute should not be lightly disregarded. *U. S.* v. *Hammers*, 221 U.S. 220; *U. S.* v. *Graham*, 110 U.S. 219; *2 Am. Jur.* (2) (Administrative Law) 68, Section 241.

IV.

In addition to the above administrative ruling the Bureau of Internal Revenue, since the filing of this suit, issued revised ruling No. 63-3, 26 C.F.R. 49 4241-1 (Appendix D), and therein held that a *privately owned organization* operating *for profit* was not a social, athletic or sporting club or organization within the meaning of *U.S.C.A. 4241,* where the facilities were *open to the general public* upon payment of a fee for each use of the facilities. With respect to that same club (designated as (N) in the ruling) the persons using the facilities had the choice of paying $25.00 a year for unlimited use of the facilities and were designated as "Greens Fee Members".

With respect to Club (N) the aforesaid regulations read in part as follows:

> "With respect to N, there are not present enough factors to characterize the business venture as 'an exclusive club or organization.' N's facilities are open to the general public, and no distinction is made between the so-called 'members' and those members of the public who pay greens fees each time they play golf. This is true with respect to both the clubhouse and the golf course facilities. Thus, there is a lack of special privileges conferred upon the so-called 'members'. Accordingly, it is held that N is not a 'social, athletic, or sporting club or organization' within the meaning of Section 4241 of the Code. Therefore, amounts paid to N are not subject to the tax imposed by that section."

The evidence in this case is not only overwhelming, but is without contradiction that no one is a member of the Miami Shores Country Club and that the general public of the Village is entitled to use the facilities at all times without let or hindrance, subject only to the payment of

charges imposed for the use of particular facilities. There are no dues as such paid to the Village. A citizen and resident of Miami Shores Village can play golf on the country club grounds merely upon the payment of the greens fee prescribed by the ordinance. *He may actually use the clubhouse without paying anything.*

"Club" as defined in *International Dictionary of the English Language,* is an association of persons for social and recreational purposes, or for the promotion of some common object jointly supported and meeting periodically.

This definition was further extended in *D.B.S. Building Association* v. *City of Erie,* (177 Pa. Super. 487) 111 A.2d 367. Here the Court said that the word "club" was defined by *Webster's International Dictionary* as "6) an association of persons for the promotion of some common object, as literature, science, politics, good fellowship, etc., esp. one jointly supported and meeting periodically. Membership is usually conferred by ballot, and carries the privilege of exclusive use of club quarters."

A club denotes privacy; and there is utterly no justification for such a characterization of a Village recreational facility. The evidence is plain that the course is a public one. There is simply nothing of a private character about this property and no legal way to wrest a concept of private use from the hard granite of public ownership.

V.

The decision cited by the United States Court of Appeals for affirmance of the lower court's judgment, viz: *U. S. v. Howe,* (C.C.A. 9) (1965), 349 F.2d 483, has absolutely nothing to do with the situation at hand, for in the *Howe* case the case the facilities were privately owned and operated for profit.

VI.

In ignoring this construction the Court of Appeals also completely disregarded the agnate provision of *26 U.S.C.* 4233. In this Act Congress, even prior to the 1958 amendment which enlarged the exemptions from excise taxes, expressly exempted admissions to recreational facilities operated by governmental agencies. Prior to the 1958 amendment, the statute read as follows:

> "*Any admissions* to swimming pool, bathing beaches, skating rinks, *or other places providing facilities for physical exercise* (other than dancing) *operated by any state or political subdivision* thereof or by the United States or any agency or instrumentality thereof *—if the proceeds therefrom inure exclusively to the benefit of the State, political subdivision,* United States Agency, or instrumentality." (Emphasis supplied).

In 1958 the last mentioned statute was broadened to include admissions, publicly operated or not. As amended, the statute now reads as follows:

> "(4) Swimming pool, etc.—*Any admissions* to swimming pools, bathing beaches, skating rinks, or other places providing facilities for physical exercise (other than dancing)."

The purpose of the amendment was obviously to encourage greater use of recreational facilities and services, either publicly or privately owned. The Court may take judicial notice of presidential policy which reflects concern over the physical condition of the youth of America; so much so that lack of physical fitness had reached the point of endangering the national safety. Fifty-mile hikes were not only encouraged, but sponsored and led by members of the administration.

It is also to be noted that Title *26 U.S.C.A.* is entitled "Facilities and Services". That is exactly what is involved here, a municipal facility or service supplied by a municipality to promote the health and well-being of the residents of Miami Shores Village.

Florida Statute 167.73, either by coincidence or design, is labeled "Charges for Use of Service and Facilities of Municipalities." This statute, *167.73(2)* reads in part as follows:

> "Each city, town or village owning, maintaining or operating any system of public recreation, any wharf, dock, yacht basin, airport, golf course, hospital, stadium, parking lot, or tourist camp, or any facility designed and intended to render a direct service to the users thereof, may provide, by ordinance of its council or other legislative body, by whatever name known, for the establishment and collection of reasonable fees and charges to be paid to the city, town or village for the use of such facility or service by each person, firm or corporation using the same."

VII.

In providing its inhabitants with a public place in which to pursue such out-of-door recreations as golf, tennis and swimming, the Village was responding to a modern and well-nigh universal demand. Its role as proprietor of a golf course was sanctioned by law and abetted by custom. By the very nature of such an activity the discrimination inherent in a social club or organization is exorcised by the due process clause; and if discrimination in any form were practiced at this facility the respondent would be the first to complain. The contention that the golf course is a public club is a meaningless contradiction in terms. If the property is public it may not be devoted to private use, and if it is not private it is not a club.

If the character of a private club with its concomitant rights of admission and rejection, of inclusion and exclusion for whimsical or personal reasons may validly be attached to a public place for one purpose, then it may attach for all. If this be so, membership may be granted or denied by reason of race, color, religion or manners; and what then becomes of such cases as *Simkins* v. *City of Greensboro,* (D.C.M.D.N.C. 1957) 149 F. Supp. 562 (Aff'd. 246 F.2d 425), wherein the Court said:

> "It is conceded that the defendants ordinarily are not required to furnish a golf course for its citizens. If, however, it undertakes to do it out of the public treasury, it cannot constitutionally furnish the facility to a part of its citizens and deny it to others similarly situated. The plaintiffs as citizens of the City of Greensboro are entitled to the equal protection of the law and cannot be deprived of their rights solely on account of color. The doctrine of Plessy v. Ferguson, supra, of equal but separate facility has been overruled in Brown v. Board of Education, supra."

See also: *Culver* v. *Warren,* 84 Ohio App. 373, 83 N.E.2d 82; *State ex rel.* v. *City of Miami Beach,* (Fla. D.C.A. 3d) (1961) 132 So.2d 349; *Niemotko* v. *State of Maryland,* 340 U.S. 268.

CONCLUSION

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit is in conflict with the decision in *Scott* v. *U. S.,* 300 F.2d 141, decided by the Sixth Circuit, and for this, as well as for the other reasons set forth herein, a ~~petition~~ writ for certiorari should be issued and the judgment below should be quashed with directions to reverse the judgment of the District Court for the South-

ern District of Florida, and to direct the entry of judgment for the petitioners.

Respectfully submitted,

HERBERT L. NADEAU

THOMAS H. ANDERSON

Attorneys for Petitioners

SHUTTS & BOWEN,
10th Floor, First National Bank Building,
Miami, Florida 33131

I, THOMAS H. ANDERSON, one of the attorneys for James W. Kindelan and Mary Kindelan, his wife, the petitioners herein, and a member of the Bar of the Supreme Court of the United States, certify that on the 17 day of January, 1966, I served copies of the foregoing Petition for Writ of Certiorari to the Supreme Court of the United States on the several parties thereto, as follows:

1. On the United States by mailing a copy thereof upon the Solicitor General, Department of Justice, Washington, D. C.

2. By mailing copies thereof to:

Louis F. Oberdorfer, Esq.,
Assistant Attorney General, Tax Division,
United States Department of Justice,
Washington, D. C.

Edward I. Heilbronner, Esq.,
United States Department of Justice,
Washington, D. C.

William A. Meadows, Jr., Esq.,
United States Attorney,
P. O. Box 1070,
Federal Building
Miami, Florida.

THOMAS H. ANDERSON

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21909

JAMES W. KINDELAN and MARY KINDELAN,
Appellants,

VERSUS

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court
for the Southern District of Florida.

(October 18, 1965.)

Before JONES and BELL, Circuit Judges, and
JOHNSON, District Judge.

PER CURIAM: The district court made findings of fact and conclusions of law which are the basis for its judgment from which this appeal was taken. *Kindelan* v. *United States,* S.D. Fla. 1964, 233 F. Supp. 537. We find ourselves in agreement with the conclusions reached by the district court. See *United States* v. *Howe,* 9th Cir. 1965, ... F.2d ..... The judgment of the district court is

AFFIRMED.

APPENDIX B

Statutes Involved

26 U.S.C.A. 4231.

"Imposition of tax

There is hereby imposed:

(1) General.—

(A) Single admission.—A tax of 1 cent for each 10 cents or major fraction thereof of the amount in excess of $1 paid for admission to any place.

(B) Season ticket.—In the case of a season ticket or subscription for admission to any place, a tax of 1 cent for each 10 cents or major fraction thereof of the amount paid for such season ticket or subscription which is in excess of $1 multiplied by the number of admissions provided by such season ticket or subscription.

(C) By whom paid.—The taxes imposed under subparagraphs (A) and (B) shall be paid by the person paying for the admission."

26 U.S.C.A. 4233. Exemptions

(a) Allowance.—No tax shall be imposed under section 4231 in respect of:

* * *

(4) Swimming pools, etc.—Any admissions to swimming pools, bathing beaches, skating rinks, or other places providing facilities for physical exercise (other than dancing)."

APPENDIX C

Petition for Rehearing

The Appellants, JAMES W. KINDELAN and MARY KINDELAN, respectfully petition this Court for a rehearing and reconsideration of this cause on the following grounds:

1. In affirming the judgment, the Court overlooked or failed to consider that the Appellants simply paid to Miami Shores Village as a consideration for using a municipal facility the sum of $200.00 on which the Appellee subsequently demanded and recovered a sum of money equal to 20% of said amount on the ground that the aforesaid sum consisted of dues paid to a sporting, athletic or social club within the meaning of Sec. 2041 of the Internal Revenue Code. The record affirmatively shows that the position of the Appellee is without justification. The price exacted from the Appellants by Miami Shores Village was fixed and determined by a Village Ordinance for use of a public facility and was in no sense dues or membership fees. The Village facility is under the control of the Village Council and no other body has any jurisdiction over it.

2. The situation reflected in *U. S.* v. *Howe*, (9th Cir. 1965) No. 19732, cited by the Court as a basis for its opinion is entirely inapposite. The operation there involved was a private club—the essentiality of which is explicitly recognized by the statute.

3. The existence of the various associations among the users of the Miami Shores Country Club affords no predicate for liability. There is no showing* that the Ap-

*A Government Exhibit shows the membership for 1962-1963 which contains Appellants' names.

pellants are, or ever have been, members of any of these associations. If they were and liability were asserted on that ground a different situation would be presented. But the Appellee does not seek to collect a tax on dues paid to these associations. It is collecting a tax on charges paid to a public body for use of a public place. All of the indicia of membership in a club are conspicuous by their absence. The want of these elements furnished the rationale for *U. S.* v. *Scott,* (C.A. 6th, 1962) 300 F.2d 141. Therefore the opinion here collides with the decision in that case.

Respectfully submitted,

THOMAS H. ANDERSON

ANDERSON & NADEAU,
Attorneys for Appellants,
1126 First National Bank Building,
Miami, Florida 33131.

I HEREBY CERTIFY that a copy of the foregoing Petition for Rehearing was mailed to LOUIS F. OBERDORFER, ESQ., Assistant Attorney General, Tax Division, United States Department of Justice, Washington, D. C. and to WILLIAM A. MEADOWS, JR., ESQ., United States Attorney, P. O. Box 1070, Federal Building, Miami, Florida, this 29 day of October, 1965.

THOMAS H. ANDERSON

APPENDIX D

PART II.—CLUB DUES

Section 4241.—Imposition of Tax

26 CFR 49.4241-1: Tax on club dues, initiation fees, Rev. Rul. 63-3 and life memberships.

M club, a privately owned and controlled organization operated for profit, offers its members certain sporting facilities. Only members and their guests are entitled to use the facilities of the club, and all applications for membership must be approved by a board of directors appointed by the club owners.

N, a privately owned organization, operates certain sporting facilities for profit. The facilities are open to the general public upon payment of a fee each time they use the facilities. However, persons paying a specified annual amount are designated as "members" and are permitted use of the facilities for a year without payment of an additional amount. Otherwise, no special privileges are conferred upon these persons.

Held, M club is a "social, athletic, or sporting club or organization" within the meaning of section 4241 of the Internal Revenue Code of 1954. However, N is not considered to be a "social, athletic, or sporting club or organization" within the meaning of that section.

Advice has been requested whether the organizations described below are "social, athletic, or sporting clubs or organizations" for purposes of the excise tax on club dues. Each of the organizations described is privately owned and is operated for profit. Each organization operates social, athletic, or sporting facilities.

M club offers its members a wide selection of facilities, such as a golf course, a swimming pool, tennis courts, and a clubhouse. The clubhouse has a dining room, a bar, locker rooms, and a golf shop. The members pay annual dues, and only the members and their guests are entitled to use the facilities of the club. Applications for membership must be approved by a board of directors appointed by the club owners. Each applicant for membership agrees to be bound by all of the rules and regulations of the club. Several classes of memberships are offered. There is a limitation upon the number of members who are entitled to golfing privileges. Membership is renewed automatically as long as dues are paid and as long as the member abides by the rules and regulations of the club. The members have no right to serve on committees, no property rights, and no voice in the management of any activities provided by the organization. They are not assessable in case of an operating loss.

N operates a golf course. The golf course and all of its related facilities, such as a golf equipment shop, dressing rooms, and a refreshment bar, are open to the general public. Any person is permitted to use the golf course and all its facilities upon the payment of a greens fee of one dollar each time he uses the golf course. However, any person who pays $25 a year is designated as a "greens fee member" and is permitted to use the golf course and its facilities an unlimited number of times during the year without payment of an additional amount. Otherwise, no special privileges are conferred upon these persons, and they have no right to vote, to hold office or to participate in the management of the organization.

Section 4241 of the Internal Revenue Code of 1954 imposes a tax on any amount paid as dues or membership fees to any social, athletic, or sporting club or organization, if

the dues or fees of an active resident member are in excess of ten dollars per year. That section also imposes a tax on any amount paid as initiation fees to such a club or organization, if such fees amount to more than ten dollars, or if the dues or membership fees, not including initiation fees, of an active resident annual member are in excess of ten dollars per year.

Section 49.4241-1 (e) of the Facilities and Service Excise Tax Regulations provides that the purposes and activities of a club or organization, and not its name, determine its character for purposes of the tax. That section further provides that every club or organization which has a membership of individuals or family units and which has social, athletic, or sporting features is presumed to be a social, athletic or sporting club or organization, until the club or organization has satisfied the district director of Internal Revenue that it is not in fact a social, athletic, or sporting club or organization within the meaning of the regulations.

Early in the history of the tax on initiation fees and dues or membership fees paid to a social, athletic, or sporting club or organization, the Internal Revenue Service set forth its position that the applicability of the tax to an amount paid to such a club or organization is not affected by the fact that the club or organization is operated for profit or that the member making the payment may not participate in its management. See S.T. 457, C.B. IV-1, 296 (1925).

The members of the M club form a distinct class with special privileges not available to the general public; they stand in a distinct relationship to each other and subject themselves to rules and regulations in their conduct and use of facilities; and they are actually associated together

for common social, athletic, or sporting purposes and look upon themselves as a select group. In addition, there is a limitation upon the number of members, and membership continues from year to year unless terminated for cause.

The foregoing factors applicable to the M club establish, in their entirety, the nature of the organization as an "exclusive club or organization," such as that referred to by the United States Court of Claims in the case of *Bunker Hill Country Club* v. *United States,* 9 Fed.Supp. 52, CT.D. 942, C.B. XIV-1, 421 (1935), certiorari denied, 296 U.S. 583. Under these circumstances, neither the character of the organization nor the excise tax liability of its members is affected by the fact that the members have no property rights in the organization and have no voice in the management of M's activities and operations. Accordingly, it is held that M is a "social, athletic, or sporting club or organization" within the meaning of section 4241 of the Code. Therefore, amounts paid as dues or membership fees to M are subject to the excise tax on club dues imposed by that section.

With respect to N, there are not present enough factors to characterize the business venture as "an exclusive club or organization." N's facilities are open to the general public, and no distinction is made between the so-called "members" and those members of the public who pay greens fees each time they play golf. This is true with respect to both the clubhouse and the golf course facilities. Thus, there is a lack of special privileges conferred upon the so-called "members." Accordingly, it is held that N is not a "social, athletic, or sporting club or organization" within the meaning of section 4241 of the Code. Therefore, amounts paid to N are not subject to the tax imposed by that section.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 948

JAMES W. KINDELAN AND MARY KINDELAN,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court's opinion (R. 213–226)[1] is reported at 233 F. Supp. 557. The *per curiam* opinion of the court of appeals (Pet. A1) is reported at 351 F. 2d 310.

JURISDICTION

The judgment of the court of appeals was entered on October 18, 1965. A petition for rehearing was denied on November 4, 1965. The petition for a writ of

[1] "R." references are to the mimeographed record in the court of appeals.

208-147—66

certiorari was filed on January 25, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[2]

QUESTION PRESENTED

Whether a country club using municipally-owned recreational facilities can constitute a "social, athletic, or sporting club or organization" under Section 4241 (a) of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954:

SEC. 4241. IMPOSITION OF TAX.[3]

(a) *Rate.*—There is hereby imposed—

(1) *Dues or membership fees.*—A tax equivalent to 20 percent of any amount paid as dues or membership fees to any social, athletic, or sporting club or organization, if the dues or fees of an active resident annual member are in excess of $10 per year.

* * * * *

(b) *By Whom Paid.*—Except as provided in section 4243(b), the taxes imposed by this section shall be paid by the person paying such dues or fees, * * *.

[26 U.S.C. 4241.]

---

[2] Petitioners (Pet. 2) mistakenly base jurisdiction on 28 U.S.C. 2101(c), which governs the time for filing a petition for a writ of certiorari.

[3] This tax has been repealed as of January 1, 1966, by the Excise Tax Reduction Act of 1965, P.L. 89-44, 79 Stat. 136, §§ 301, 701.

STATEMENT

Petitioners, residents of Miami Shores Village, paid to the Miami Shores Country Club an annual golf and pool fee of $200 for each of the years 1959, 1960, and 1961. The Commissioner determined that the payments were dues or membership fees subject to the 20 percent excise imposed by Section 4241(a) of the 1954 Code. Petitioners paid taxes and interest of $138.60, and brought this suit for refund.

The Village owned and operated the country club facilities, which included a golf course, swimming pool, tennis courts, and a club house with a dining room, locker rooms and two bars (R. 214–215). Residents of the Village and approved nonresidents who, like petitioners, paid annual dues were permitted to use the country club facilities without further charge and became members of the Miami Shores Country Club Association.[4] The Association, a non-profit organization, elected the Board of Committees and the chairmen of the various operational sub-committees which were technically advisory in character, but which substantially controlled the country club except in fiscal matters (R. 215–217, 222–223, 224; see R. 218–219).

[4] The sports facilities were also available to Village residents who were not members of the Association if they paid an annual charge of $10 and an additional fee each time they used a particular facility. However, signs on the premises gave notice that certain areas were restricted to annual dues-paying members (R. 223–224).

The district court found that the country club was a social and sporting club or organization, and concluded that the regular dues paid by petitioners were properly subjected to the excise tax for the years involved (see R. 224–226). The court of appeals affirmed *per curiam* (Pet. A 1).

ARGUMENT

The decision of the court of appeals is correct and is, moreover, of little future importance in view of Congress' repeal of the governing statute (see footnote 3, *supra*). There is no conflict or other circumstance warranting further review.

Petitioners argue that, since the facilities were owned and operated by the Village rather than by the members, the country club cannot be considered a "club or organization" within the meaning of Section 4241(a) of the 1954 Code. That and similar contentions have been uniformly rejected by the courts of appeals and the Court of Claims. *United States* v. *Howe,* 349 F. 2d 483 (C.A. 9); *Scott* v. *United States,* 300 F. 2d 141 (C.A. 6); *United States* v. *Anderson,* 108 F. 2d 475 (C.A. 7); *Munn* v. *Bowers,* 47 F. 2d 204 (C.A. 2), certiorari denied, 283 U.S. 845; *McCaughn* v. *Williams,* 23 F. 2d 840 (C.A. 3), certiorari denied, 276 U.S. 629; *Bunker Hill Country Club* v. *United States,* 9 F. Supp. 52 (Ct. Cl.), motion for new trial denied, 10 F. Supp. 159, certiorari denied, 296 U.S. 583.

The excise is levied upon the privilege of membership in a particular type of organization, regardless of who owns the facilities of the organization. *E.g.*, *Scott* v. *United States, supra,* at 143–144; *Munn* v. *Bowers, supra,* at 205. Ownership of property, frequently a consequence of club membership, is not a condition or prerequisite thereto. *United States* v. *Howe, supra,* at 489; *United States* v. *Anderson, supra,* at 479. Although the term "club" would not ordinarily encompass municipally-owned parks which are open to the general public, the nonprofit Miami Shores Country Club was sufficiently controlled by its restricted membership (through the Board of Committees and its subcommittees) to bring it within the statute.[5] Miami Shores also exhibited other indicia of a private country club (R. 223–225). See Rev. Rul. 63–3, 1963–1 Cum. Bull. 258. In any event, the question whether Miami Shores was a club

[5] Petitioners rely (Pet. 10) on a letter ruling of October 19, 1943, in which it was held that (R. 192–193) "Miami Shores Golf Club does not qualify as a social, athletic, or sporting club or organization, within the meaning of Section 1710 of the Internal Revenue Code [of 1939], and that the dues and fees paid by the members are not subject to tax." As the district court pointed out (R. 225), the situation at Miami Shores was not the same in the years in question as it was in 1943 and thus "reliance upon the * * * determination letter * * * is of no avail." See Treasury Regulations on Facilities and Services Excise Tax (1954 Code), § 49.4241–1(e) (26 C.F.R., § 49.4241–1(e)). The golf course and facilities had been open to the general public until 1946 (R. 215). Thereafter, restrictions on membership changed the character of the organization (R. 225).

is essentially factual (*Downtown Club of Dallas* v. *United States*, 240 F. 2d 159 (C.A. 5)), and there is no occasion to reexamine the concurrent findings of the two courts below.[6]

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

C. MOXLEY FEATHERSTON,
Acting Assistant Attorney General.

ROBERT N. ANDERSON,
EDWARD HEILBRONNER,
Attorneys.

FEBRUARY, 1966.

---

[6] Recognizing that *Scott* v. *United States*, 300 F. 2d 141 (C.A. 6), reached precisely the same result as the court below, petitioners nevertheless assert that there is a "direct conflict in spirit between the two decisions" (Pet. 7). The Sixth Circuit in *Scott*—after holding that the district court had overstated the extent of the city's participation—held that the members ran the club, as distinguished from the facilities, through a board composed of seven elected representatives and one municipal representative, and held the dues subject to tax (300 F. 2d at 143–144). In the instant case, all of those who sat on the Board of Committees were elected by the club members. The two decisions are not inconsistent.

U.S. GOVERNMENT PRINTING OFFICE: 1966

Office-Supreme Court, U.S.
FILED
MAR 11 1966
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 948

JAMES W. KINDELAN and MARY KINDELAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF TO BRIEF FOR THE UNITED STATES

THOMAS H. ANDERSON
10th Floor
First National Bank Building
Miami, Florida 33131
Attorney for Petitioners

Of Counsel:
SHUTTS & BOWEN
10th Floor
First National Bank Building
Miami, Florida 33131

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 948

JAMES W. KINDELAN and MARY KINDELAN,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

REPLY BRIEF TO BRIEF FOR THE UNITED STATES

The Government's brief in opposition to the Writ is based upon demonstrably false assumptions. For example it is said that the Miami Shores Country Club Association elected the Board of Committees and the Chairmen of the various operational sub-committees "which substantially controlled the country club except in fiscal matters." The Miami Shores Country Club Association was not the association, membership in which is claimed to be subject to the excise tax herein involved. It was a voluntary association of golfers and others who used the facilities of the club. Former chairmen of this associa-

tion testified that they had no control over the activities of the club. Miller, R. 136; Holt, R. 127; Thornton, R. 141, 143.

Moreover, McCall, Village Manager, testified that the country club was a part of the Recreational Department, was operated under the Village Manager, who in turn appointed a Club Manager, who in turn appointed his own staff and hired his own people (R. 29, 31).

Again the Government says that the Miami Shores Country Club was sufficiently controlled by its restricted membership (through the Board of Committees and its sub-committees) to bring it within the statute.

The witnesses Holt, Miller and Thornton, who testified for the Government, completely disaffirm any authority that they might have thought they had as chairmen of the association to control the activities in the club.

Our position is that there cannot factually exist an exclusive club on a municipally owned, operated and controlled facility. The Miami Shores Country Club is operated as a part of the Recreational Department of the Village which functions under an act of the Legislature.

There is simply no factual situation that would justify the imposition of the tax herein levied.

The Writ should issue.

Respectfully submitted,

THOMAS H. ANDERSON

SHUTTS & BOWEN,
Attorneys for Petitioner,
10th Floor, First National Bank Building,
Miami, Florida 33131.

I HEREBY CERTIFY that a copy of the foregoing Reply Brief was mailed to THURGOOD MARSHALL, Solicitor General and C. MOXLEY FEATHERSTON, Acting Assistant Attorney General, U. S. Department of Justice, Washington, D. C., this 2nd day of March, 1966.

THOMAS H. ANDERSON